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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No._____

ROBERT J. STRAUSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

FROM THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
CRIMINAL CASE

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Questions Presented for Review:

Whether a defendant in a federal criminal case must show prejudice in order to demonstrate reversible error as a result of a violation of Rule 30, Federal Rules of Criminal Procedure.

Whether a District Court in a federal criminal case may properly instruct a petit jury that a grand jury may hear evidence inadmissible before a petit jury, and that the grand jury has found probable cause to believe that the defendant has committed the crime, or crimes, charged.

Parties to the Proceeding:

The charges in this case were brought by the Department of Justice of the United States Government. Petitioner, ROBERT J. STRAUSS (STRAUSS), was the Defendant below.

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Opinion Below

The Opinion of the United States Court of Appeals, Eleventh Circuit, below (Appendix A, *infra*) is reported at 678 F.2d 886.

A jury verdict was rendered below on March 2, 1981, and judgment and commitment entered by the United States District Court for the Middle District of Florida, Tampa Division, on April 17, 1981. (Judgment and Probation/Commitment Order, Appendix B, *infra*).

Jurisdictional Statement

The Judgment of the United States Court of Appeals, Eleventh Circuit, was entered on June 11, 1982.

On July 1, 1982, a Petition for Rehearing was filed and, on August 4, 1982, an Order entered denying the Petition for Rehearing.

On Motion, on August 16, 1982, an Order was entered staying the issuance of the mandate pending the filing of a Petition for Writ of Certiorari in this Court.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

Statutes and Rules Involved

18 USC §2313

> §2313. Sale or receipt of stolen vehicles. Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 USC §2315

> §2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps. - Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been

stolen, unlawfully converted, or taken; or ... Shall be fined not more than $10,000 or imprisoned not more than ten years, or both....

Rule 30, Federal Rules of Criminal Procedure

Rule 30. Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Statement of the Case

On November 18, 1980, an indictment, in four (4) Counts, was returned against STRAUSS. Count I of the indictment charged STRAUSS with receiving a stolen motor home in violation of 18 USC §2313. Count II charged STRAUSS with inducing and procuring the transportation of this same motor home in violation of 18 USC §2312. Count III charged STRAUSS with receiving a stolen boat in violation of 18 USC §2315. Count IV charged STRAUSS with receiving a stolen truck in violation of 18 USC §2313. During the course of trial, the District Court announced its intention to give an instruction pertaining to the function of the grand jury. STRAUSS' request to be advised of the actual instruction to be given was denied, and STRAUSS' further request that he be permitted to object to the giving of that instruction prior to its being given, and outside the hearing of the jury, was likewise denied.

The instruction pertaining to the grand jury advised the petit jury, inter alia, that a grand jury may hear evidence inadmissible before a petit jury, and that the grand jury here had found probable cause to believe that STRAUSS had committed the crimes charged. The jury returned a verdict of not guilty as to Count II of the indictment. The jury returned verdicts of guilty as to Counts I, III, and IV of the indictment. On April 17, 1981, the District Court entered a judgment and commitment Order thereon and sentenced STRAUSS to a term of imprisonment for a period of three (3) years as to each Count, the sentences to run concurrently.

On June 11, 1982, the Eleventh Circuit Court of Appeals affirmed STRAUSS' conviction.

A Petition for Rehearing was filed on July 1, 1982, and, on August 4, 1982, the Petition was denied. Thereafter, the Eleventh Circuit granted STRAUSS' Motion for Entry of a Stay of the Mandate, pending filing of a Petition for Writ of Certiorari in this Court.

ARGUMENT

Whether a Defendant in a Federal Criminal Case Must Show Prejudice in Order to Demonstrate Reversible Error as a Result of a Violation of Rule 30, Federal Rules of Criminal Procedure.

During the course of trial, the District Court announced its intention to give an instruction pertaining to the function of the grand jury. STRAUSS' request to be advised of the actual instruction to be given was denied, and STRAUSS' further request that he be permitted to object to the giving of that instruction prior to its being given, and outside the hearing of the jury, was likewise denied. These actions by the District Court patently violated Rule 30, Fed.R.Crim.P. Although finding that this instruction was not "so exhaustive as it might have been," that it had "reservations" as to the propriety of the instruction's advice that a grand jury may hear evidence inadmissible before a petit jury, and that the grand jury had found probable cause to believe that STRAUSS had committed the charged crimes (App. A, *infra*), the Eleventh Circuit nevertheless held that "any error" in compliance with Rule 30 would not mandate reversal "absent some showing of prejudice." The Eleventh Circuit then noted that the Fifth Circuit, in *United States v. Salinas*, 601 F.2d 1279, (5th Cir. 1979), did note that there "may be some uncertainty" in the Circuit as to whether, given a violation of Rule 30, a defendant must show prejudice, or whether a court need only entertain a considerable doubt about the existence of prejudice. Notwithstanding this "ambiguity" in prior decisions of the Circuit, the Eleventh Circuit adopted the former test, requiring a showing of prejudice in order to result in reversible error. This test, with respect to a violation of Rule 30 Fed.R.Crim.P., is in direct conflict with the decisions and tests applied to the same subject by the Third Circuit, in *United States v. Schartner*, 426 F.2d 470 (3d Cir. 1970), by the Ninth Circuit, in *United States v. Hamling*, 481 F.2d 307, (9th Cir. 1973), by the Fourth Circuit, in *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948), and the

Tenth Circuit, in *Hall v. United States*, 378 F.2d 349 (10th Cir. 1967). These Circuits have held that such a violation of Rule 30 does constitute reversible error, unless it affirmatively appears from the record that the defendant was not prejudiced, and that a violation of Rule 30 mandates a reversal, even where the defendant cannot affirmatively prove prejudice. In *Hamling v. United States*, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974), this Court held:

> "The Court of Appeals in this case felt that the rule announced by the Third Circuit in United States v. Schartner supra, was the appropriate one for application where Rule 30 has not been complied with. *The court in Schartner held that a District Court's failure to comply with the 'out of the presence of the jury' requirement of Rule 30, upon proper request by a party, constitutes reversible error 'unless it be demonstrated on an examination of the whole record that the denial of the right did not prejudice' the defendant's case.* 426 F.2d, at 480. Applying that Rule, the Court of Appeals here concluded that there was no prejudice to any of the petitioners as a result of the District Court's failure to comply with Rule 30... This provision suggests the *soundness of an approach similar to that of the Court of Appeals here and the various other Courts of Appeals, supra, which have in some manner examined the prejudice to the defendant in deciding whether reversal is required where* there is a failure to comply with Rule 30. ... The Court of Appeals felt that it should apply the somewhat stricter test of the Schartner case, supra... *we express no view, of course, as to whether a court of appeals may follow the apparently more lenient standard of requiring the defendant to demonstrate he was prejudiced.*" (41 L.Ed.2d 590, 630-631). (Emphasis supplied).

STRAUSS submits that the more lenient standard of requiring a defendant to demonstrate that he was prejudiced as a result of a violation of Rule 30, adopted by the Eleventh Circuit here, is erroneous and must be rejected. This important question of federal law has not been, but should be, finally settled by this Court. STRAUSS submits that the standard adopted by the

Third, Fourth, Ninth, and Tenth Circuits should be adopted by this Court as the law in the Federal Courts for the reasons set forth in the preceding decisions of those circuits.

Whether a District Court in a Federal Criminal Case May Properly Instruct a Petit Jury That a Grand Jury May Hear Evidence Inadmissible Before a Petit Jury, and That The Grand Jury Has Found Probable Cause to Believe That The Defendant Has Committed the Crime, or Crimes, Charged.

During the course of trial, the District Court instructed the jury concerning the function of a grand jury (App. C, *infra*). STRAUSS was not given the opportunity of being apprised of the actual instruction to be given, or to make objection to it before it was given. This instruction advised the jury, inter alia, that a grand jury may hear evidence inadmissible before a petit jury, and that the grand jury here had found probable cause to believe that STRAUSS had committed the crimes charged. The Eleventh Circuit validated this instruction. By doing so, the Eleventh Circuit has rendered a decision in conflict with the decisions of other Federal Courts of Appeal on the same matter, specifically, the Sixth, Seventh, Eighth, and Ninth Circuit Courts of Appeal. These other circuits have specifically held that: (1) it is always improper to suggest to the jury that a defendant is guilty from the mere fact that he is being prosecuted, or that a defendant is guilty merely because he has been indicted; (2) it is highly improper to inform a petit jury that the evidence presented to it is evidence which was presented to a grand jury, and upon which a grand jury based its indictment; and (3) informing a petit jury concerning the procedures involved in getting the case before them is improper, and requires reversal. *United States ex rel Clark v. Fike*, 538 F.2d 750 (7th Cir. 1976); *United States v. Bess*, 593 F.2d 749 (6th Cir. 1979); *United States v. Lewis*, 423 F.2d 457 (8th Cir. 1970); *Weaver v. United States*, 379 F.2d 799 (8th Cir. 1967); and *United States v. Cummings*, 468 F.2d 274 (9th Cir. 1972).

The Eleventh Circuit conceded that the District Court gave a "more detailed explanation" of the function of the grand jury than was absolutely necessary. Further, it acknowledged that it had "reservations" concerning the statements that a grand jury may hear evidence inadmissible before a petit jury, and that the instant grand jury had found probable cause to believe that STRAUSS had committed the crimes charged. Nevertheless, the Eleventh Circuit found the instruction "not appropriate." Noting that that Circuit had not previously ruled on the propriety of explaining to the petit jury the role of the grand jury, the Eleventh Circuit then went on to observe that other circuits, referring to the Seventh Circuit and Tenth Circuit, had considered that matter, in the cases of *United States v. Garcia*, 562 F.2d 411 (7th Cir. 1977); *Brandon v. United States*, 431 F.2d 1391 (7th Cir. 1970); and *United States v. MacKay*, 491 F.2d 616 (10th Cir. 1973). The Eleventh Circuit then found that these "sister" circuits in these decisions had held that an explanation to a petit jury of the role of a grand jury "need not be error." While it is true that these three (3) decisions did "consider" the matter here at issue, they do not support the holding attributed to them by the Eleventh Circuit. In *United States v. Garcia, supra*, the instruction given contained several points of qualification, none of which were made by the District Court here. In *United States v. MacKay, supra*, the language of the instruction in question is not provided in the opinion, and, accordingly, the opinion there is not instructive. Finally, in *Brandom v. United States, supra*, as in *MacKay*, the actual language in question was not set forth, although the opinion does state that the trial judge correctly informed the jury as to the "limited nature" of the grand jury's role, and the fact that the return of an indictment is no evidence of guilt, factors not included in the instruction here given by the District Court. More importantly, the Eleventh Circuit's validation of the erroneous, and highly prejudicial, instruction given here is in direct conflict with the holdings of the decisions above cited, in the Sixth, Seventh, Eighth and Ninth Circuits. Advising a petit jury that another jury has heard certain evidence inad-

missible before them, had found probable cause, and had issued an indictment, most certainly would lead petit jurors to include the potential existence of incriminating, but inadmissible, evidence, and the earlier finding of probable cause as factors when deliberating on the guilt or innocence of a defendant, and is patently prejudicial to a defendant. This Court should finally settle the issue of whether such an instruction is ever appropriate, under any circumstances, and notwithstanding additional language of qualification. STRAUSS submits that the single, legally permissible, response to such an inquiry must be in the negative, and that the Court should take this opportunity to finally lay at rest this issue in the Federal Courts.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals holding that a defendant in a federal criminal case must show prejudice in order to demonstrate reversible error as a result of a violation of Rule 30, Federal Rules of Criminal Procedure, is erroneous. Further, the decision of the Eleventh Circuit Court of Appeals holding that the District Court properly instructed the jury that, inter alia, a grand jury may hear evidence inadmissible before a petit jury, and that the instant grand jury had found probable cause to believe that STRAUSS had committed the crimes charged was likewise erroneous. On these grounds, STRAUSS petitions this Court to grant this Writ of Certiorari to determine the extent of the errors, and remedy same by vacating the judgment below and remanding for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing have been sent by First Class United States Mail to Solicitor General, Department of Justice, Washington, D.C. 20530, and to Manuel Menendez, Jr., Chief Assistant United States Attorney, 410 Robert L. Timberlake Building, 500 Zack Street, Tampa, Florida 33602, this 3rd day of September, 1982, and that all parties required to be served have been served.

Paul B. Johnson, Esq.